

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

APR 15 1996

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of)

Amendment of Part 20 and 24 of the)
Commission's Rules -- Broadband PCS)
Competitive Bidding and the Commercial)
Mobile Radio Service Spectrum Cap)

WT Docket No. 96-59

Amendment of the Commission's Cellular)
PCS Cross-Ownership Rule)

GN Docket No. 90-314

To: The Commission

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COMMENTS OF DCR COMMUNICATIONS, INC.

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SUMMARY

DCR Communications, Inc. ("DCR") is a small, minority and woman-owned business whose subsidiary is a bidder in the pending C block PCS auction and intends to bid for D, E, and/or F block licenses. DCR fully supports the Commission's efforts to fashion the F block rules in order to ensure a speedy auction that will provide designated entities with a meaningful opportunity to compete for 10 MHz licenses. Indeed, DCR believes that in order to accommodate the needs of small businesses to secure coverage that is comparable to that of their more entrenched cellular and A/B block competitors, the Commission should extend these same opportunities to designated entities bidding on the D and E blocks, not just the F block licenses, and should auction all these 10 MHz licenses simultaneously to reduce costs and disseminate licenses more quickly.

To ensure fair treatment of all designated entities that have applied or will apply for PCS licenses, DCR strongly urges the Commission not to change the structural, financial caps, or preference rules mid-stream. However, the Commission should eliminate the affiliation exception on a prospective basis, because of the potential for abuse and the absence of the kind of reliance interest that existed in the peculiar circumstances applicable to the C block auction. Transfers of licenses among qualified bidders should be permitted, but cellular licensees should not be permitted to obtain initial PCS licenses or make investments in initial PCS licenses, above the limits previously set by the Commission.

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COMMENTS OF DCR COMMUNICATIONS, INC.

DCR Communications, Inc. ("DCR") respectfully submits these comments in response to the Notice of Proposed Rulemaking ("NPRM") in the above-captioned matter.^{1/}

DCR is a small, minority and woman-owned business whose subsidiary is currently bidding in the C block auction for PCS licenses. DCR also is considering applying for D, E, and/or F block licenses. In order to participate in the C block auction, DCR has structured itself in accordance with the Commission's control group rules for small, woman and minority businesses, relying upon the Commission's complex control group, attribution, and financial cap rules for the C block in fashioning its ownership structure. The Commission has taken commendable steps to address the rules for the D, E, and F blocks now, so that any outstanding issues can be resolved without interfering with the

^{1/}

NPRM, FCC 96-119 (released March 20, 1996).

timely process of auctioning those licenses. DCR submits these comments in response to the Commission's specific proposals.

I. THE COMMISSION SHOULD FOREGO THE USE OF RACE AND GENDER PREFERENCES IN THE F BLOCK TO ENSURE THAT DESIGNATED ENTITIES HAVE A PROMPT AND MEANINGFUL OPPORTUNITY TO COMPETE FOR 10 MHZ LICENSES.

As a minority and woman-owned business, DCR supports the Commission's efforts to establish opportunities for minority and woman-owned businesses and does not believe that the Commission should lightly abandon its race and gender auction preferences. Nonetheless, DCR is prepared to forego these preferences rather than see the completion of the last round of PCS auctions interminably delayed by certain litigation.

If, as the Commission tentatively concludes, the record compiled to date does not contain evidence to demonstrate the compelling interest necessary to survive strict scrutiny under Adarand Constructors v. Pena, 115 S. Ct. 2097 (1995),^{2/} any effort to maintain the race and gender^{3/} preferences in the upcoming PCS auctions would necessarily result in protracted delay. The Commission would have to delay further auctions to compile a sufficient record. Even after assembling the required

^{2/} Id. ¶¶ 19-20, 23.

^{3/} Although Adarand did not analyze gender preferences, it is likely that such preferences would be subject to similar challenges following that decision. See Lamprecht v. FCC, 958 F.2d 382 (D.C. Cir. 1992).

evidence, the Commission would no doubt face litigation challenges by parties objecting to such preferences.^{4/}

DCR agrees with the Commission's observation that this delay could interfere with the Commission's obligations to "facilitate the rapid delivery of new services to the American consumer and promote efficient use of the spectrum."^{5/} In addition, protracted delay would fundamentally prejudice the Commission's ability to assist minority and woman-owned businesses. In order to be viable participants in the PCS market in the face of the substantial headstart enjoyed by the A/B licensees, these businesses must obtain licenses quickly. C block bidders that had hoped to make the 10 MHz licenses part of an overall business plan to provide service expeditiously will see their hopes disintegrate if the licenses are not available in the near future.^{6/}

As the Commission notes, there was no shortage of minority and woman-owned businesses participating in the C block

^{4/} NPRM ¶ 26.

^{5/} Id.

^{6/} DCR advocates combining the D, E, and F block auctions and providing the small business preferences in all three blocks. Therefore, the licensing of all the 10 MHz licenses would be delayed in the event of designated entity-related litigation. Separating the auctions (and restricting the preferences to the F block) would cause independent problems: if the D and E blocks were permitted to progress while the F block languished as a result of legal challenges, minority and woman-owned businesses would face additional, exacerbated problems of a dwindling subscriber base and a growing headstart -- not only of larger 30 MHz A/B block MTA licensees, but of competing 10 MHz licensees.

auction, despite the fact that the race and gender-based preferences were eliminated. Providing meaningful incentives to small businesses benefitted minority and woman-owned businesses, which by and large are less well-capitalized small businesses. Leveling benefits up, as was done in the C block, so that all small businesses have a realistic opportunity to compete for 10 MHz licenses, will protect the interests of minority and woman-owned businesses and encourage their participation, while ensuring the expeditious auction of the licenses. The Commission should, as proposed, continue its information collection efforts to monitor minority and woman-owned business participation.^{7/}

II. THE COMMISSION SHOULD MAINTAIN THE C BLOCK CONTROL GROUP AND FINANCIAL CAP RULES SO THAT ENTITIES RELYING ON THOSE RULES ARE NOT PREJUDICED.

The Commission proposes amending the control group/attribution and financial cap rules for the 10 MHz licenses.^{8/} DCR believes that the small business eligibility rules for the F block preferences should mirror those that were established for the C block.

A. Control Group/Attribution Rules

It would clearly be unfair to deny preferences in the F block to small business entities that devoted their limited resources to structuring themselves according to the C block rules. And even with respect to proposed changes that would make

^{7/} Id. ¶ 48.

^{8/} Id. ¶¶ 31-32, 50.

the F block rules less rather than more restrictive, C block applicants would be unfairly burdened. Small businesses that opted to wait for the 10 MHz licenses could amass the same 30 MHz of spectrum as a C block licensee -- particularly if the preferences are extended to the D and E blocks -- without being subject to the same control group restrictions. Future C block licensees presumably will not be permitted to change their structures (without jeopardizing their C block licenses) to take advantage of less restrictive F block rules.

Moreover, the control group/attribution rules proved workable in the C block and did not lead to undue confusion or abuse. While the Commission may wish to change the rules for future services, applicants for PCS should all operate under similar rules. Thus, the control group and attribution rules should be maintained.

However, DCR proposes that the Commission not extend the affiliation exception to entities seeking to qualify for the F block preferences.^{9/} As the Commission notes, this exception has been targeted as one potentially likely to lead to abuse.^{10/} The exception permits control group members to be affiliated with large businesses, raising questions of control, and providing small entities with capital that is not consistent with simultaneously receiving the benefits of the small business

^{9/} Id. ¶ 38.

^{10/} Id.

preferences. Whereas the Commission was understandably concerned with the reliance interests of C block applicants in deciding not to eliminate the affiliation exception in the C block, no such interests exist here because F block applicants have known the rules were in flux, and the auction is not as imminent as it was in context of the C block. While C licensees that relied on this rule should not be excluded, the rule should not be extended to new applicants.

B. Small Business Financial Caps

DCR is concerned about the Commission's suggestion that C block bidders might be excluded based on consideration of revenues from the operation of their licenses (or because a C block license itself is now considered a newly acquired asset of substantial value).^{11/} The Commission clearly stated in the Fifth Memorandum Opinion and Order that it "has a strong interest in seeing entrepreneurs grow and succeed in the PCS marketplace. Thus, normal projected growth of gross revenues and assets, or growth such as would occur as a result of a licensee acquiring additional licenses . . . would not generally jeopardize continued eligibility."^{12/}

In fact, in assessing whether an entity qualifies as a small business or entrepreneur for unjust enrichment analysis in

^{11/} Id. ¶¶ 33, 50.

^{12/} Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, Fifth Memorandum Opinion and Order, 10 FCC Rcd 403, 420 (1994).

C block license transfers, the Commission indicated that it would seek up to date financial statements only in "cases where the entity to whom the license is being transferred did not win a license in the original entrepreneur's block auction."^{13/} See also 47 C.F.R. § 27.111(c)(3) (noting that normal growth from operations will not affect continued eligibility for installment payments). Clearly, the Commission intended that any entity that qualified as an entrepreneur (or small business) and won a license would continue to qualify regardless of financial growth. Consistent with these determinations, the C block licenses should not be considered in calculating total assets for F block purposes, and C block license revenue (if any) should also not be considered. In fact, DCR believes that there is no reason that C block licensee applicants for F block licenses should be required to submit new statements of gross revenues and updated total assets, unless they have new affiliates or attributable investors that have been added since the submission of the C block short or long forms.

The Commission also should take care to ensure that any new rules concerning the necessary financial showing are compatible with the rules governing the C block. For example, C block applicants submitted gross revenues information for the years 1992-1994, whereas the NPRM refers to gross revenues "for

^{13/} Id., at 468 (emphasis added).

the preceding three years."^{14/} The Commission should clarify to C block licensees whether new information they are required to submit -- for instance, regarding any new attributable investors -- should be for the years 1992-1994, or for more recent years, and whether that rule applies only to F block eligibility, or to continued eligibility for the C license.

In general, DCR believes that adopting the \$40 million cap for the F block small business preferences is appropriate for all applicants, and that no smaller size standard is necessary. In this way, the C and F block preferences will have been available to similarly situated applicants. DCR does believe, however, that the Commission should allow certified financial statements rather than audited financial statements, so that the burden on all small businesses can be reduced.

III. THE INSTALLMENT PAYMENT TERMS, BIDDING CREDITS, AND UPFRONT PAYMENT AND DOWNPAYMENT TERMS FOR 10 MHZ LICENSES SHOULD MIRROR THOSE IN THE C BLOCK.

In discussing its proposal to eliminate race and gender installment payment and bidding credit preferences and make these available to all qualifying small businesses equally,^{15/} the Commission inquires whether the six-year, interest-only installment payment term and the full 25% bidding credit that applied to the 30 MHz C block licenses are necessary for the "lesser valued" 10 MHz licenses. DCR advocates retaining the

^{14/} NPRM, ¶ 49.

^{15/} Id. ¶¶ 45, 47.

same terms for the 10 MHz licenses. To begin with, the 10 MHz licenses may have been part of C block applicant's business plans, informing their C block bidding. Part of such plans would necessarily entail whether the 10 MHz licenses would be available on similar terms, as was generally expected due to the original similarity between the C and F block rules. Furthermore, as the C block experience demonstrates, the price for the licenses may end up being surprisingly high. For small companies, even the price for a 10 MHz license may be significant.

For the same reasons, the Commission should not alter the C block discounted upfront and downpayment plans for the 10 MHz licenses. There is no indication that these discounts led to "frivolous bidding and bidder default" in the C block.^{16/} In fact, providing small businesses with the full panoply of C block payment terms should help avoid bidder defaults and ensure that small businesses will be able to make their required payments. Congress recently restated its commitment to helping small businesses, recognizing that "a vibrant and growing small business sector is critical to creating jobs in a dynamic economy."^{17/} The Commission should continue to support the ability of small businesses to become active PCS opportunities by extending them meaningful benefits.

^{16/} Id. ¶¶ 57-59.

^{17/} Small Business Regulatory Fairness Act, H.R. 3136, 104th Cong., 2d Sess. (1976), P.L. 104-121, § 202 (a).

IV. THE COMMISSION SHOULD COMBINE THE D, E, AND F BLOCK AUCTIONS, AND SHOULD MAKE THE SMALL BUSINESS PREFERENCES APPLICABLE TO ALL 10 MHZ LICENSES.

The Commission seeks comment on whether it should auction the D, E, and F block licenses concurrently, and whether accommodations need be made to reflect the difference in eligibility between the F block and the D and E blocks.^{18/} The Commission also seeks comment concerning whether it should extend the small business preferences to the D and E blocks.^{19/} DCR believes that many small businesses are interested in bidding in all the blocks to maximize their chances of obtaining licenses and to fill gaps between or expand upon their C block licenses. Auctioning all the licenses simultaneously would permit applicants to pursue such plans while reducing administrative costs and saving time; it would also ensure that licensees received all their 10 MHz licenses at the same time, so that the headstart problem can begin to be countered for all license areas simultaneously.

If all the licenses are auctioned simultaneously, it is sensible to extend all the small business preferences -- not just the installment payment terms -- to the D and E blocks. Any qualifying small business applicant would therefore be able to bid on either D, E, or F block licenses and have available to it the fully panoply of payment preferences, including bidding

^{18/} NPRM, ¶¶ 85-86.

^{19/} Id. ¶ 54.

credits, installment terms, and discounted upfront and downpayments. This will increase opportunities for small businesses to obtain 10 MHz licenses, without unduly prejudicing large businesses that have significantly more capital and are not handicapped by limited financing. No special arrangements need be made to reflect the difference in eligibility for the F block versus the D and E blocks^{20/}: non-qualifying entities should simply be prohibited from including the F block BTAs on their short forms, and thus would be prohibited from submitting bids for those licenses. This arrangement would realize the Commission's goals of providing meaningful assistance and opportunities to designated entities and of ensuring the wide and speedy dissemination of licenses.

DCR strongly urges the Commission not to begin the auctions for any of the 10 MHz licenses until the C block licenses have been granted. C block applicants cannot realistically focus on the D, E, and F blocks and their plans or needs for the 10 MHz licenses until the C block process is complete. Furthermore, waiting to begin the D, E, and F block auction until the C block licenses have been granted will reduce the administrative burden and costs for both the Commission and license applicants.

^{20/}

Id. ¶ 86.

V. THE COMMISSION SHOULD AMEND THE NO-TRANSFER RULES AND CLARIFY THE PRO FORMA EXCEPTION THERETO.

The Commission proposes easing the no-transfer rules to permit F block^{21/} licensees to transfer their licenses during the first three years.^{22/} Transfers would be permitted only to an entity that qualifies as an entrepreneur.^{23/} DCR encourages the Commission to adopt this rule change, which would permit small businesses to make realistic and sometimes necessary business decisions, without permitting speculators or sham bidding. DCR also notes that in making this rule change, the Commission should clarify that pro forma transfers clearly also are permissible during the initial three years (and thereafter); while DCR believes that this has always been the intention of the rules, they rules fail to mention this well-established no-transfer exception.^{24/}

VI. THE COMMISSION SHOULD MAINTAIN THE CELLULAR-PCS OWNERSHIP CAPS TO PROTECT FLEDGLING PCS COMPETITION.

The Commission seeks inquiry on whether the cellular-PCS spectrum cap should be maintained. DCR believes that it is

^{21/} Presumably, the no-transfer and unjust enrichment rules that apply to the F block would apply to any D or E block licenses that were obtained using small business preferences.

^{22/} NPRM, ¶ 62.

^{23/} Id.

^{24/} See, e.g., 47 C.F.R. §§ 22.40; 21.39; 22.920 (c)(2); and 73.3597(a)(3). In addressing transfers for Part 22 CMRS licenses, the Commission noted, "[n]o holding period is required when the transfer is . . . pro forma, because the risk of speculation in these instances is nonexistent." Third Report and Order, 9 FCC Rcd 7988, 8160 (1994).

essential that the Commission maintain this cap, aside from the more general CMRS cap. Cellular providers will be among the chief competitors that PCS companies will face. If cellular companies are permitted to add significant amounts of PCS spectrum to their existing cellular licenses, there is little chance that PCS entrants -- especially small companies -- will have a meaningful chance of success. Using this additional spectrum, cellular companies will quickly be able to offer additional services and obtain more subscribers, leaving PCS licensees with little to offer. The name recognition alone would attract many subscribers that might otherwise experiment with new PCS systems.

Moreover, cellular licensees obtained their spectrum for free, and can easily build on their existing systems using new spectrum without amassing the costs that PCS licensees do and will face. The impact on PCS providers could be extreme. Small companies will be especially disadvantaged. The result would be that cellular companies, rather than new entrants, would dominate PCS, which otherwise promises to introduce several new competitors into every market. In addition, because of their existing investments and expertise, cellular companies will be more likely to expand on their existing technologies rather than experimenting with new services and technologies.

Section 309(j)(3)(B) of the Communications Act mandates that the Commission promote economic opportunity and competition,

and that it ensure "that new and innovative technologies are readily accessible to the American people." The Commission is also required to avoid "excessive concentration of licenses." As demonstrated above, it is entirely reasonable for the Commission to therefore restrict cellular licensees to one 10 MHz license, at least until PCS licensees have had a realistic opportunity to startup and enter the marketplace. The Commission's rules permit cellular licensees to obtain more spectrum once PCS companies have had an opportunity to establish themselves.^{25/} Until that time, however, it is essential that the Commission continue to enforce the 10 MHz cross-ownership restriction.^{26/}

For the same reasons, cellular company investment should be restricted to 20% (and 40% for investments in or held by small business applicants) for attribution purposes.^{27/} These limits are already high, as the Commission notes.^{28/} In most other cross-ownership contexts, such as broadcast, cable operator\broadcast network, cable national subscriber limits, cable channel occupancy, and even PCS\PCS, the attribution

^{25/} 47 C.F.R. § 24.204(b).

^{26/} See, e.g., Amendment of the Commission's Rules for Rural Cellular Service, Order on Reconsideration of the Second Report and Order, 4 FCC Rcd 5377 (1989) (discussing the Commission's similar rules maintaining the "wireline fence" during the initial years of cellular service).

^{27/} Id. ¶¶ 72-73.

^{28/} Id.

threshold is 5%.^{29/} An investment of five percent is the level that the Commission has recognized as being sufficient to confer an ability to influence or control the licensee's decision making.^{30/} And Congress has recognized that a 10% stake is sufficient to suggest control or "affiliation" in the new Telecommunications Act.^{31/} Thus, the 20% threshold is exceedingly reasonable, especially given the Commission's special concerns regarding cellular control of PCS spectrum.

While the higher attribution standard for small businesses permits small businesses some flexibility in attracting capital and expertise, other entities do not require the same flexibility. If cellular companies are permitted to exceed the generous 20% stake in PCS licensees, it would be difficult for the Commission to ensure that the cellular company was not acting in its own interests in influencing the affairs of the PCS licensee. Limiting the investment stake that cellular entities can hold will ensure that they do not dominate the PCS market or obtain anticompetitive advantages by participating in that market.

^{29/} See Review of the Commission's Regulations Governing Attribution of Broadcast Interests, 10 FCC Rcd 3606, ¶¶26-27 (1995).

^{30/} Id.

^{31/} Pub. L. No. 104-104, § 3(a)(2)(33), 110 Stat. 56 (1996).

VII. THE COMMISSION SHOULD NOT ABANDON ITS OWNERSHIP DISCLOSURE RULES AT THE LONG FORM STAGE.

The Commission proposes to "reduce the scope of information required by [its] general PCS rules at either the short-form or long-form filing stages."^{32/} DCR agrees with the Commission that at the short form stage, restricting ownership information disclosure to CMRS and PMRS interests is appropriate. However, it is imperative that the Commission vigilantly enforce the requirement that only eligible small businesses obtain entrepreneurs' block licenses. If more extensive ownership information is not available at the long form stage, the Commission may well not have sufficient information to ensure the legitimacy of such applicants and to identify overlapping ownership, affiliations, and control issues. DCR believes that the Commission can more appropriately respond to the burden of ownership information disclosures at the long form stage by providing applicants with reasonable additional time, or by raising the relevant floor from 5% to 10%, which, as noted above, is the relevant ownership percentage for affiliation in the new Telecommunications Act.^{33/}


^{32/} NPRM, ¶ 81.

^{33/} Pub. L. No. 104-104, § 3(a)(2)(33), 110 Stat. 56 (1996).

CONCLUSION

DCR supports the Commission's efforts to provide meaningful opportunities for designated entities in bidding for 10 MHz licenses, and advocates the suggestions outlined herein.

Respectfully submitted,


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CERTIFICATE OF SERVICE

I hereby certify that on April 15, 1996, a copy of the foregoing comments of DCR Communications, Inc. was served by first class mail, postage prepaid, except where hand delivery is otherwise indicated, to the names on the attached service list.


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